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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

A Massachusetts statute -- the "Massachusetts Burma Law" -- limits the authority of state agencies (but not private persons) to buy goods and services from persons who do business with Burma. This type of law is known as a "selective purchasing law." The questions presented are:

1. Whether economic sanctions against Burma enacted by Congress in 1996 -- three months after enactment of the Massachusetts Burma Law -- implicitly permit, or preempt, state and local selective purchasing laws regarding Burma.

2. Whether selective purchasing laws such as the Massachusetts Burma Law represent "market participation," not regulation, and are therefore exempt from claims based on the Foreign Commerce Clause and the foreign affairs power of the federal government.

3. Whether selective purchasing laws such as the Massachusetts Burma Law unconstitutionally interfere with the power of the federal government to conduct foreign affairs.

4. Whether selective purchasing laws such as the Massachusetts Burma Law discriminate against foreign commerce in violation of the Foreign Commerce Clause.

PARTIES TO THE PROCEEDING

The plaintiff-respondent is the National Foreign Trade Council, Inc. (NFTC). According to the NFTC, it is a "nonprofit corporation; it issues no stock and has no parent corporations, subsidiaries or affiliates." The petitioner-defendants are Andrew S. Natsios, the Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson, III, the state purchasing agent of the Commonwealth of Massachusetts. The defendants are sued solely in their official capacities.

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JURISDICTION

The judgment of the court of appeals was entered on June 22, 1999. Pet. App. 74. No rehearing or rehearing *en banc* was sought. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Petitioners invoked and the court of appeals found jurisdiction pursuant to 28 U.S.C. § 1291. Petitioners no longer contest the standing of plaintiff-respondent to maintain this case. *See* Pet. App. 14 n.6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8

The Congress shall have Power . . . [t]o provide for the common Defence . . .; [t]o regulate Commerce with foreign Nations . . . ; [t]o establish an uniform Rule of Naturalization . . . ; [t]o define and punish . . . Offences against the Law of Nations . . . ; [and] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and

Water . . . .

United States Constitution, Art. I, § 10

No State shall . . . enter into any Treaty, Alliance, or Confederation [or] grant letters of Marque or Reprisal . . . [or] without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [its] inspection Laws . . . . No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Art. II, § 2

The President shall be Commander in Chief . . . [and] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors . . . .

United States Constitution, Art. II, § 3

[The President] shall receive Ambassadors and other public Ministers . . . .

United States Constitution, Art. III, § 2

The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Mass. Gen. Laws Ann. ch. 7, §§ 22G-22M

The full text of the Massachusetts Burma Law, Mass. Gen. Laws Ann. (M.G.L.A.) ch. 7, §§ 22G-22M (West 1999 Supp.), appears at Pet. App. 88-94. Excerpts from the same sections appear in the Statement of the Case, below.

STATEMENT OF THE CASE

1. Procedural History

Plaintiff NFTC filed its complaint on or about April 30, 1998. Jt. App. 12. The parties filed a stipulation of facts (Jt. App. 209), cross-motions for summary judgment, and uncontested affidavits. Pet. App. 13-14. No party argued that a material fact was in dispute.

On November 4, 1998, the district court entered a memorandum and order granting summary judgment for the NFTC. Pet. App. 13-14, 75. The district court found that the Massachusetts Burma Law was not preempted by federal law, stating that the NFTC had "failed to carry [its] burden" to show preemption and that the "evidence does not establish sufficient actual conflict for th[e] court to find implied preemption." *Id.* at

85-86 (citation omitted). Nevertheless, the district court held that the Burma Law "impermissibly infringes on the federal government's power to regulate foreign affairs." *Id.* at 77. Quoting *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968), the court stated that the Massachusetts Burma Law "has more than an indirect or incidental effect in foreign countries" and a "great potential for disruption or embarrassment." Pet. App. 81. The sole evidence of "disruption or embarrassment" cited by the district court was the withdrawal of three companies from Burma and protests against the law filed by the European Union, the Government of Japan, and the Association of South East Asian Nations. Pet. App. 81-82. The district court did not reach the claim by the NFTC under the Foreign Commerce Clause. *Id.* at 86. On November 17, 1998, the court entered final judgment.

Petitioners timely appealed to the court of appeals, which affirmed. The court of appeals first noted that the parties "agreed" that "human rights conditions" in Burma "are deplorable." Pet. App. 5. The court acknowledged that the "passage of the Massachusetts Burma Law has resulted in significant attention being brought to the Burmese government's human rights record." Pet. App. 73. "Indeed," the court said, "it may be that the Massachusetts law was a catalyst for federal sanctions." *Id.* The court nevertheless held that (1) "the law interferes with the foreign affairs power of the federal government"; (2) the law represents regulation, not market participation, and violates the Foreign Commerce Clause; and (3) the law "violates the Supremacy Clause because it is preempted by federal sanctions against Burma." Pet. App. 5.

2. Facts

A. The Massachusetts Burma Law

The Massachusetts Burma Law was enacted in July, 1996, Mass. St. 1996, c. 130, and entitled "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)." M.G.L.A. c. 7, §§ 22G-M. According to the United States Department of State, the "people of Burma continue to live under a highly authoritarian military regime that is widely condemned for its serious human rights abuses." 1st Cir App. (hereafter "R.") 336. In the months following enactment of the Massachusetts Burma Law in 1996, the United States, the European Union, Japan, and other countries imposed economic sanctions on Burma. Jt. App. 74-75, 78-81; R. 338, 342-48. *See also United States Department of State, Burma Country Report on Human Rights Practices for 1998* (February 26, 1999).

The Burma Law limits the procurement of goods and services by Massachusetts state agencies from persons who do business with Burma. It does not prohibit private investment in Burma; it does not prohibit private trade in goods and services in Burma; it does not govern the distribution of private assets or estates; it does not restrict foreign travel. It expressly applies to all Massachusetts and other United States companies, as well as foreign companies, doing business in Burma and seeking procurement contracts from the Commonwealth of Massachusetts.

The Burma Law effectively requires state agencies to increase by 10 percent the price of offers to sell goods and services to the Commonwealth submitted by companies that do

business with Burma. M.G.L.A. ch. 7, § 22H(d). Subject to certain exceptions, the Burma Law provides that "a state agency, a state authority, the house of representatives or the state senate may not procure goods or services from any person listed on the restricted purchase list maintained by the secretary [of administration and finance], or who is determined through affidavit or through other reliable methods to meet the criteria for so being listed." M.G.L.A. ch. 7, § 22H(a). By its terms, the statute imposes "preference requirements" (§ 22I) rather than an absolute prohibition on state contracting with companies doing business with Burma. Thus, exceptions are authorized when the procurement is "essential" and enforcement of the restriction would "eliminate the only bid or offer, or would result in inadequate competition[,]" § 22H(b)(1) and (2); when the State is purchasing certain kinds of medical supplies, § 22I; or when there is "no comparable low bid or offer" by a bidder who is not on the list. § 22H(d). A "comparable low bid or offer" is defined as "a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service." § 22G. In practice, the "comparable low bid or offer" provision is applied by adding 10 percent to offers made by persons determined to be doing business with Burma. Pet. App. 7-8.

Section 22J(a) provides that the "secretary shall establish and maintain a restricted purchase list . . . [which] shall contain the names of all persons currently doing business with Burma (Myanmar)." "Doing business with Burma" is defined by § 22G as: "(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned

subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary licensee or franchise[e] of such a person; (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement; (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar); (d) providing any goods or services to the government of Burma (Myanmar)." Under sections 22H(e) and 22I, persons with operations in Burma limited to the "reporting the news" or providing goods or services "for the provision of international telecommunications," or "providing only medical supplies" are exempt from the restrictions of the Act.

The Act directs the Secretary of Administration and Finance (the Secretary), "[i]n establishing the restricted purchase list," "to consult United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources." § 22J(b). "The Secretary shall also place the name of any person [on the list] who, in the statement [submitted to state agencies under section 22H], declared that he meets the criteria for being so listed." *Id.*

B. Federal Legislation Concerning Burma

Three months after Massachusetts enacted its Burma Law, Congress authorized federal sanctions against Burma. *See* Pet.

App. 10-12. The Omnibus Consolidated Appropriations Act of 1997 (the Federal Burma Law), Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 through 3009-167 (Section 570), approved September 30, 1996, imposed conditional sanctions on Burma "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government . . . ." § 570(a). The sanctions include an end to most bilateral assistance (§ 570 (a)(1)) and the opposition by the United States to most multilateral aid. *Id.* at § 570(a)(2).

Section 570 also authorizes and directs the President "to prohibit . . . United States persons from new investment in Burma, if [he] determines and certifies to Congress that, after the date of th[e] Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition." *Id.* at § 570(b). "New investment" is defined by the Act to include "the economical development of resources located in Burma" but does "not include the entry into, performance of, or financing of a contract to sell or purchase goods, services or technology." *Id.* at § 570(f)(2).

The Act further directs the President to "seek to develop, in coordination with members of the Association of Southeast Asian Nations (ASEAN) and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma." *Id.* at § 570(c).

Finally, the Act requires the President to submit reports every six months to certain Congressional committees on: "(1) progress toward democratization in Burma; (2) progress on improving the quality of life of the Burmese people . . .; and (3) progress made in developing the [multilateral] strategy referred to in subsection (c) ['to bring democracy to and improve human rights practices . . . in Burma']." *Id.* at § 570(d).

C. Federal Executive Action Concerning Burma

On October 3, 1996, the President issued a proclamation entitled "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate or Implement Policies That Are Impeding the Transition to Democracy in Burma or Who Benefit from Such Policies." Proclamation No. 6925 (Oct. 3, 1996), 61 Fed. Reg. 52,233, 1996 U.S.C.A.A.N. at A83. The President stated that the "current regime in Burma continues to detain a significant number of duly elected members of parliament, National League of Democracy activists, and other persons attempting to promote democratic change in Burma." *Id.* The President further stated that the "regime has failed to enter into serious dialogue with the democratic opposition and representatives of the country's ethnic minorities . . . and has failed to meet internationally recognized standards of human rights." *Id.*

Seven months later, the President issued an Executive Order implementing section 570. Exec. Ord. 13047, 62 Fed. Reg. 28,301 (1997). In the Order the President "determine[d] and certif[ied] that, for purposes of [Section 570(b)], the Government of Burma has committed large-scale repression of the democratic

opposition in Burma after September 30, 1996, and further determine[d] that the actions and policies of the Government of Burma constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and declare[d] a national emergency to deal with that threat." *Id.* Accordingly, the President "prohibit[ed] new investment in Burma by United States persons . . . ," subject to certain exceptions. *Id.*; *see also* R. 338 (Department of State summary of earlier unilateral United States sanctions, including "suspending economic aid, withdrawing GSP [General System of Preferences] . . . , implementing an arms embargo, blocking assistance from international financial institutions, downgrading our representation [from ambassador to charge d'affaires], and imposing visa restrictions on senior regime leaders and their families").

SUMMARY OF ARGUMENT

Introduction. For more than two hundred years, citizens of Massachusetts and other States have used boycotts to support the "natural, essential, and unalienable rights" of people around the world. *See* Mass. Const. of 1780, Pt. 1, art. 1 (West 1997 ed.). The Massachusetts Burma Law closely resembles private boycotts and the scores of divestment and selective purchasing laws enacted by state and local governments in the 1980s concerning South Africa. The Massachusetts law is also similar to many recent state and local laws and resolutions concerning Northern Ireland, Cuba, and Switzerland -- laws and resolutions now at risk in light of the broad ruling of the court below.

Nothing in our federal Constitution denies to the States the

right to apply a moral standard to their spending decisions. Not one constitutional grant, prohibition, or command requires the States to trade with dictators. In an era of global procurement and trade, state spending decisions will inevitably rile foreign countries and even risk embarrassment to the United States. These commonplaces, however, do not support constitutional judgments against selective purchasing laws. State laws that threaten national interests may be addressed by Congress, "whose voice, in th[e] area [of foreign affairs], is the Nation's." *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 331 (1994). Absent clear and valid preemption of state law by Congress, the States should be -- and are -- free to choose their own vendors and indirectly seek to "secure the blessings of liberty" around the world. U.S. Const., Preamble.

I. The Federal Burma Law does not preempt -- but rather implicitly permits -- state and local selective purchasing laws regarding Burma. The Court should presume that the state law is valid, notwithstanding the foreign subject of the federal law. The presumption of validity is supported by the cases of this Court, the historical importance of the state spending power, and the close similarity between the state law and indisputably valid private boycotts. [Pp.15-17]

Whatever presumption applies, there is no basis for a finding of preemption. Recent actions and inaction by Congress show that the Federal Burma Law does not impliedly preempt state and local selective purchasing laws concerning Burma. Congress was aware of state and local Burma laws in 1996 but took no action to preempt them. The absence of a preemption clause is especially telling here in light of the scores of similar laws enacted in the 1980s and Congress's failure to preempt them. The same federal

legislative history shows that Congress has impliedly *permitted* state and local laws regarding Burma. While the court below noted that "it may be that the Massachusetts law was a catalyst for federal sanctions," it failed to appreciate the significance of its statement: the strongest evidence of implicit permission present here and absent in *Barclays* is the fact that Congress later enacted a law on the same subject but did not expressly preempt state law. [Pp. 17-21]

Even if Congress has not implicitly permitted the state law, there is no actual conflict between the state and federal laws that would support a finding of preemption. The state law is consistent with the federal purpose: to promote human rights in Burma. The federal law does not create a scheme so comprehensive as to infer conflict from the mere differences between state and federal law. Nor do these differences alter a "balance" struck by Congress or frustrate the purpose of the later-enacted federal law. [Pp. 21-24]

II. Whether or not Congress has implicitly permitted the Burma Law, it is constitutional because the law represents market participation, not regulation, and therefore is not subject to claims under the dormant foreign commerce or foreign affairs powers. The constitutional basis for the market participation exception applies equally to these powers. The express limits on state action affecting foreign affairs imposed by Article I, § 10, read in light of the Tenth Amendment, further show that the Framers did not intend to impose unstated limitations on proprietary powers that might have foreign effects. [Pp. 25-29]

Selective purchasing laws such as the Burma Law represent market participation, not regulation. The laws represent the right to boycott exercised by private persons -- including NFTC

members -- long before and after the adoption of the federal Constitution in 1787. The important differences between the federal and state Burma laws further show that the state law is proprietary and the federal law regulatory. Whatever its aspirations for change abroad, the state law seeks to disassociate the Massachusetts government and its tax dollars from the denial of human rights in Burma. This valid local purpose further shows that the procurement law at issue is market participation, not regulation. [Pp. 29-36]

III. The court of appeals held that the Massachusetts law "interferes with the foreign affairs power of the federal government." The Court need not reach this question: it may decide that selective purchasing is market participation and therefore not subject to a claim under the dormant foreign affairs power. Alternatively, the Court may decide that the *Barclays* test for implicit Congressional permission for action challenged under the Foreign Commerce Clause applies equally to a claim under the dormant foreign affairs power and that Congress has implicitly permitted state and local selective purchasing laws. [Pp. 36-38]

If the Court reaches the merits of the claim under the foreign affairs power it should reject it. The structure and terms of the Constitution require the Court to read *Zschernig v. Miller*, 389 U.S. 429 (1968), narrowly to permit the indirect effects of selective purchasing laws. In any event, the state law satisfies even *Zschernig* because its effects are indirect, not direct; remote, not immediate; and contingent, not inevitable. Whatever the aspirations of a selective purchasing law, its center of gravity lies at home, not abroad, and its effects are distinguishable from the direct effects of the regulation of foreign inheritances. The

complaints of foreign countries under a *trade* agreement do not change this result. Given the rise of global trade, judicial reliance on such complaints grants foreign countries a "heckler's veto" and will embroil the courts in case-by-case review of state laws touching foreign affairs. [Pp. 38-46]

IV. If the Court reaches the merits of the issue, it should hold that the Burma Law does not violate the Foreign Commerce Clause. The Burma Law applies equally to all foreign and domestic companies that seek to sell goods and services to state agencies. While the law might cause some state business to shift from one international supplier to another, that effect does not violate the Clause. The law should also be upheld because it has a legitimate local purpose: to disassociate Massachusetts from the human rights violations in Burma. The statement in support of freedom made by the law does not interfere with the ability of the United States to "speak with one voice" on foreign affairs because it does not affect the *capacity* of Congress to establish uniformity if the national interest so requires. The court of appeals erred in making its own evaluation of the national interest here. [Pp. 46-50]

ARGUMENT

I. THE FEDERAL BURMA LAW DOES NOT PREEMPT -- BUT RATHER IMPLICITLY PERMITS -- STATE AND LOCAL SELECTIVE PURCHASING LAWS REGARDING BURMA.

A. The Court Should Presume That Selective Purchasing Laws Are Not Preempted and Construe the Federal Burma Law to Preserve the Historic State Power of Procurement.

The court of appeals conceded that the Federal Burma Law was enacted after the Massachusetts law yet contains no express preemption clause. Pet. App. 64. However, citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), the court below ruled that when "Congress legislates in an area of foreign relations, there is a *strong presumption* that it intended to preempt the *field*, in particular where the federal legislation does not touch on a traditional area of state concern." Pet. App. 69-70 (emphasis added). The court thus inverted the settled presumption against preemption and placed on the States the burden of proving that Congress did *not* intend to preempt selective purchasing laws.

Contrary to the ruling below, the presumption against preemption applies equally to federal laws that concern foreign affairs. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."); *United States v. Pink*, 315 U.S. 203, 230 (1942)("[E]ven treaties . . . will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this Nation unless clearly necessary to effectuate the national policy."); *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 6 (1986) (claim of "occupation of the field" of "international aviation" reviewed

under usual preemption principles, notwithstanding "extensive[]" federal regulation); *cf. Barclays*, 512 U.S. at 326 (state need only show "implicit permission" of Congress to sustain state law touching foreign affairs in challenge under Foreign Commerce Clause).

Nothing in *Hines* inverts the usual presumption supporting state laws. *Hines* struck down state action that clashed with a "complete scheme of regulation" enacted by Congress for alien registration. *See* 312 U.S. at 66. At most, *Hines* and similar cases suggest that a lower degree of conflict might *overcome* the presumption of validity, particularly where the federal policy affecting foreign affairs does not also affect "a field which the States have traditionally occupied." *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-8 (1988). None of these cases, however, weakens the presumption against preemption and in favor of the historic state power over spending.

"Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Alden v. Maine*, 119 S.Ct. 2240, 2264 (1999). The allocation of state resources includes the choice of vendors of goods or services. In making this choice -- in deciding with whom the State will deal -- the State acts as "guardian and trustee" for its citizens. *Reeves v. Stake*, 447 U.S. 429, 438 (1980). The foreign resonances of these choices do not change their local character. *See* Arg. II.B, below; *Heim v. McCall*, 239 U.S. 175, 191-94 (1915) (state contracting law not inconsistent with treaty; "conditions" for "public work" a "special power of the State"). Selective purchasing laws are in their essence local measures resembling private boycotts, and the Court should not presume that Congress intended to impose greater

limits on state and local governments than on private persons. *Cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (First Amendment protects private boycotts); *New York v. United States*, 505 U.S. 144, 177-78 (1992) (generally applicable federal laws do not present same issues of federalism as laws that single out the States). For these reasons, the Court should presume that the Burma Law is valid and construe the Federal Burma Law to avoid preemption.

B. Congress Has Consistently Failed to Occupy the Field Long Held by State and Local Selective Purchasing Laws.

Whatever presumption the Court applies, the relevant actions and inaction of Congress show that the Federal Burma Law does not impliedly preempt state and local selective purchasing laws concerning Burma. Congress was aware of the state and local Burma laws in 1996 but took no action to preempt them. *See Beal v. Doe*, 432 U.S. 438, 447 (1977) (Congress presumed to be aware of state laws on similar subject). The absence of a preemption clause is especially telling here in light of the scores of similar laws enacted in the 1980s and Congress's failure to preempt them. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l Law 821, 822 (1989) (twenty-three States and eighty cities enacted divestment or procurement laws regarding South Africa); *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 562 A.2d 720, 744-49 (1989) (local divestment ordinance not preempted by federal Comprehensive Anti-Apartheid Act (CAAA) of 1986), *cert. denied*, 493 U.S. 1093 (1990); 10 Op. Off. Legal Counsel

65, 86-90, 1986 WL 213238 (state and local divestment and selective purchasing laws not preempted by federal action prior to CAAA); H.R. Res. 548 and 549, 99 Cong., 2d Sess. (1986) (denying preemptive intent of CAAA); 132 Cong. Rec. H6757-67 (September 12, 1986) (House debate on same); 132 Cong. Rec. S12533 (Sept. 15, 1986) (Sen. Kennedy, quoting testimony of Laurence H. Tribe); *see also* Brief for Members of Congress, *Amici Curiae*, Supporting Petitioners (citing subsequent federal laws concerning South Africa). More recently, Congress has debated the wisdom of state and local purchasing laws (*see id.*) and introduced sanctions reform legislation, but has not proposed federal laws that would expressly preempt state and local measures.[1] In contrast, when Congress has wished to preempt state action that might affect foreign affairs, it has done so expressly. *See* Export Administration Act of 1979, 50 U.S.C. app. § 2407(c) (West 1991) (Anti-Arab boycott provisions "preempt any law, rule or regulation" specified).

This history of congressional action and inaction shows that Congress in 1996 did not deny to state and local governments a freedom of choice that they and private citizens have long

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[1] Thus, in 1997, the federal bill intended to limit federal trade sanctions did not apply to state and local legislation, even though its sponsor noted that "roughly twenty States and localities have adopted laws prohibiting government commercial dealings with United States or foreign companies that do business with countries that have poor human rights records" and "some of [these] . . . sanctions raise difficult questions concerning the constitutional authority to conduct U.S. trade and foreign policy." H.R. 2708, 105th Cong., 2d Sess. (1997); 143 Cong. Rec. E2080 (October 23, 1997)(Rep. Hamilton).

enjoyed. Rather, the legislative history shows that while several Congresses have been well aware of state and local selective purchasing laws, they have not viewed them as inconsistent with federal or multilateral efforts to promote human rights around the world.

C. Congress Has Implicitly Permitted Selective Purchasing Laws Regarding Burma.

The federal legislative history set forth above not only shows the absence of express or implied preemption, but also demonstrates "implicit" Congressional "permission" for selective purchasing laws, under the reasoning of *Barclays*, 512 U.S. at 326.

In *Barclays*, the Court upheld the California "worldwide unitary" method of taxing multinational corporations, relying on Congress's "implicit permission" for that method. *Id.* at 324, 326, 329. The Court noted that the Constitution allocates to Congress the power to establish uniformity -- to "speak with one voice" in matters affecting foreign nations -- when it wishes to do so. *Id.* at 329. Where, however, Congress had failed to nullify the state tax at issue, despite attacks by the Executive Branch, *id.* at 328-29, and a "battalion" of foreign countries, *id.* at 320, 324 n.22, the Court determined that Congress had implicitly permitted the law and thus protected it from a claim that it interfered with the conduct of foreign relations.

In this case, Congressional action and inaction in 1986, 1996, and 1997 -- regarding South Africa, Burma, and federal sanctions generally -- show implicit permission for selective

purchasing laws regarding Burma. *See also* Brief for Non-Profit Organizations, *Amici Curiae* (international human rights conventions ratified by Senate reserve enforcement of human rights to the States). In addition to this legislative history, the federal act implementing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) shows further evidence of congressional intent to permit the States to enact laws that might otherwise raise constitutional issues. The federal act implementing GATT denies to private persons and foreign governments the right to maintain an action in federal or state court against a State law on the basis of GATT. *See* Uruguay Round Agreement Act of 1994 (URRA), P.L. 103-465, § 102(c)(1), 108 Stat. 4809, 4818, 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1). Only the United States may file such an action, and it has not. *Id.* Furthermore, in approving the "Statement of Administrative Action" (SAA) proposed by the President for implementation of the URRA (*see* 19 U.S.C. §§ 3511(a) and 3512(d)), Congress stated that the denial of all private rights of action extends to those that "seek, directly or indirectly, the private enforcement of [GATT]," including suits "based on Congress' Commerce Clause authority." SAA, *reprinted at* 1994 U.S.C.A.A.N. at 4055. By foreclosing such suits against state procurement laws, Congress has given implicit permission for the Burma Law.

Despite Congressional action and inaction in 1986, 1994, 1996, and 1997, the court below found that the evidence of Congressional permission in this case is weaker than the evidence in *Barclays*. Pet. App. 60-63. While the court noted that "it may be that the Massachusetts law was a catalyst for federal sanctions" (Pet. App. 73), it failed to appreciate the significance of its

statement: the strongest evidence of implicit permission present here and absent in *Barclays* is the fact that Congress *later enacted a law on the same subject but did not expressly preempt state law.* This Court should credit this evidence and hold that Congress has implicitly permitted state and local selective purchasing laws on Burma.

D. The Differences between State Selective Purchasing Laws and the Federal Ban on Private Investment Do Not Establish Actual Conflict with the Federal Law or Frustrate Its Purpose: to Promote Human Rights in Burma.

Even if Congress has not implicitly permitted selective purchasing laws regarding Burma, the court of appeals erred in holding that there is an actual conflict between the state and federal laws. The federal sanctions are intended by Congress "to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma." P.L. 104-208, § 570(c). Federal officials have acknowledged that related state and private actions share the same goal. *See* Jt. App. 199 (State Department official describes "shared goal" of federal and state action); R. 419 (Secretary of State opines that "it is only right that Burma is subject to international sanctions *and consumer boycotts*")(emphasis added). Even the broadest purpose ascribed to the Massachusetts law -- to promote human rights in Burma -- is consistent with these goals. Where the state law furthers the

purpose of the federal law, the Court should not find conflict. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 82-83 (1987).

Nor is there any actual conflict between the state and federal laws. United States companies may physically comply with both. Foreign companies are not subject to the federal law. The state law does not authorize the new investment prohibited by the federal law or prohibit trade in goods and services permitted by the federal law.

The court of appeals nevertheless held that (1) "Congress has constructed a reasonably comprehensive statute covering a field of foreign relations," and (2) the state law "conflict[s]" with federal law because it "veers from the carefully balanced path that Congress has constructed" and therefore "threatens to upset that balance . . . ." Pet. App. 70, 73.

First, the court of appeals exaggerated the fact and significance of the "comprehensiveness" of the federal law. Even an "intricate and complex response[] from the Congress" does not necessarily show that Congress intends to exclude state and local action. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). Rather, the Court "must look for special features warranting preemption." *Id.* Although the Federal Burma Law is in some respects "comprehensive" (*e.g.*, prohibiting all future *private* "development of resources" in Burma), it is not "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613 (1991); *id.* ("comprehensive regulatory statute" had "ample room" for State "to supplement federal efforts"); *Board of Trustees*, 562 A. 2d at 740-44 *(Comprehensive* Anti-Apartheid

Act does not preempt divestment law) (emphasis added); H.R. Res. 548 and 549, 99 Cong., 2d Sess. (1986) (same). At most, the federal statute creates a comprehensive scheme to coordinate Burma policy among the branches and agencies of the federal government.

Second, the Court should reject the court of appeal's view that the state law "conflict[s]" with federal law because it "veers from the carefully balanced path that Congress has constructed" and therefore "threatens to upset that balance . . . ." Pet. App. 73. The court deemed the federal approach "multilateral" and said that the state law departed from that path. *Id.* at 71. As the District Court noted, however, the federal sanctions are unilateral. *See* Pet. App. 86; 142 Cong. Rec. S8752-53 (July 25, 1996) (State Department testifies that United States "maintain[ed] a range of unilateral sanctions and d[id] not promote U.S. commercial investment ties with Burma"); R. 338 and n.1 (same).[2] Thus, the federal policy toward Burma is not *exclusively* multilateral: the United States has chosen to use both unilateral and multilateral tools to achieve reform in Burma.

Nor do the alleged differences between the state and federal approaches show preemption. *See* Pet. App. 70-71. State laws

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[2] The NFTC has said that the federal law on Burma "does not make the new investment ban contingent on multilateral agreement." Jt. App. 61. NFTC's affiliate, USA-Engage, has noted the unilateral nature of recent United States foreign policy, stating that "[i]n just four years the United States has imposed 61 unilateral economic sanctions on 35 countries . . . ." R. 366; *see also* R. 356, 358-361 (describing specific United States policies toward countries including Burma as "unilateral sanctions").

are generally not preempted "solely because they impose liability over and above that authorized by federal law." *English v. General Electric Co.*, 496 U.S. 72, 89 (1990). Even differences with "adverse impact" on "national policy" may not establish actual conflict, particularly where there is evidence of Congressional permission. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-34 (1981). The purported "balance" struck by Congress in this case has not been disturbed because their is no evidence that the state law has thwarted the federal sanctions or hindered human rights in Burma. Absent such proof, there is no basis whatsoever to conclude that the federal purpose has been so frustrated to create "conflict" and warrant preemption.

Instead of identifying actual conflict, the court below conducted "[a] free wheeling judicial inquiry into whether [the] state statute is in tension with federal objectives [and] undercut the principle that it is Congress rather than the courts that preempts state law." *Gade v. National Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring). The court of appeals found preemption on the mere facts that Congress has imposed sanctions on Burma and the earlier state law differs from the federal law. These facts do not support preemption in this case.

II. THE BURMA LAW IS CONSTITUTIONAL BECAUSE IT REPRESENTS MARKET PARTICIPATION, NOT REGULATION, AND THE LAW THEREFORE IS NOT SUBJECT TO CLAIMS UNDER THE DORMANT FOREIGN COMMERCE AND FOREIGN AFFAIRS POWERS.

A. The Market Participation Doctrine Applies to Claims under Both the Dormant Foreign Commerce and Foreign Affairs Powers.

Whether or not Congress has implicitly permitted the Burma Law, it is constitutional because it represents market participation, not regulation, and is therefore not subject to claims under the dormant foreign commerce and foreign affairs powers.

The Court has primarily applied the market participant exception to claims under the domestic Commerce Clause. *See, e.g., White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 214-15 (1983) (rejecting Commerce Clause challenge to City of Boston requirement that at least 50% of the private workforce on all construction projects funded wholly by the city must be Boston residents); *Reeves, Inc. v. Stake*, 447 U.S. at 436-37 (upholding state law prohibiting sale of state-produced cement to non-state residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (upholding "bounties" paid by State for scrap cars where law favored state residents seeking bounties); *Camps Newfound/Owatonnav. Town of Harrison*, 520 U.S. 564, 593 (1997) (state tax exemption is not market

participation where there is no "direct state involvement in the market" through state "purchase" or "sale" of goods). The Court has reserved the question whether the exception applies to the Foreign Commerce Clause. *See Reeves*, 447 U.S. at 438 n.9. The court of appeals saw this question as one of policy, "weighing the risks inherent in state regulation of foreign commerce . . . ." Pet. App. 49-50. The Court should reject this approach and rule that the history and structure of the dormant foreign commerce and foreign affairs clauses do not nullify proprietary state action.

"The historical evidence no more suggests that the Commerce Clause was intended to limit the ability of states to purchase goods (including securities) and services in the marketplace when their operations indirectly affect foreign commerce than it indicates such an intent when their operations affect domestic commerce." 10 Op. Off. Legal Counsel at 72-73 (summarizing historical evidence). The primary purpose of the Foreign Commerce Clause -- itself a grant of *regulatory* power -- was to enable Congress to address problems created by state *regulation* of foreign commerce, particularly state tariffs. *Id.* There is nothing in the history of that clause that suggests that it was intended, *sub silentio*, to displace state proprietary activity. *See* Brief of North Dakota, *et al.*, *amici curiae*.

This conclusion is supported by the other constitutional bases for the market participation exception. The market participation doctrine rests on a "healthy regard for federalism and good government" and the constitutional "restraint . . . counseled by considerations of state sovereignty . . . ." *Reeves*, 447 U.S. at 437-38, 441. Indeed, in *Reeves*, the Court noted that it was no part of the "*constitutional plan* to limit the ability of states themselves to operate freely in the free market."

Id. at 437 (emphasis added). This statement assumes that at the time of the adoption of the Constitution, the States acted in both proprietary and regulatory roles. In 1903, the Court distinguished between these roles in dismissing a substantive due process claim against a state law requiring contractors hired by a state agency to limit their employees to an eight-hour day. *Atkins v. Kansas*, 191 U.S. 207, 222-23 (1903). The Court held that the law did not unconstitutionally infringe on the "liberty" of the contractor because the state, "as the guardian and trustee for its people," could "prescribe the conditions upon which it will permit public work to be done on its behalf . . . and [n]o court has authority to review" such action. *Id.*

Reeves also noted the "long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . . ." *Id.* at 438-439 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see also Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (government's "unrestricted power . . . to determine those with whom it will deal"). "[W]hen acting as proprietors, States should similarly share existing freedoms from federal constraints, *including* the inherent limits of the Commerce Clause." *Reeves*, 447 U.S. at 439 (emphasis added).

These broad constitutional bases for the market participation doctrine show that it applies to claims under the Foreign Commerce Clause. The "greater scrutiny" given by the Court to some state actions touching foreign affairs (*see id.* at 438 n.9) should be limited to state regulatory measures. In cases involving proprietary action and foreign affairs, a State's role as "guardian and trustee for its people" may actually be enhanced: no guardian

would lightly allow state tax dollars to support the denial of human rights by a foreign regime. While the rise of global commerce has brought the world to the States' doorsteps, the Constitution -- through the market participation exception -- allows the States to turn the more suspect peddlers away.

The market participation doctrine likewise applies to the claim that the Burma Law interferes with the ability of the federal government to conduct foreign affairs. As explained below in Argument III, *Zschernig v. Miller*, 389 U.S. 429 (1968), remains the "only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power of the federal government." Pet. App. 30. *Zschernig* applied the doctrine to an Oregon law that regulated the distribution of private estates to nonresident aliens. Nothing in the opinion of the Court addressed state proprietary activity.

The historical basis for the federal foreign affairs powers does not imply the displacement of state proprietary power. The Framers were primarily concerned with congressional control over the exercise of state *regulatory* power affecting foreign affairs -- particularly tariffs. *See The Federalist* No. 22, at 144 (C. Rossiter ed. 1961); *id.* No. 23 at 153. They also expressly denied to the States the right to undertake actions -- such as treaties or acts of war -- long associated with international sovereignty. Article I, § 10. These express limitations on state action in Article I are significant. "In view of the Tenth Amendment's reminder that the powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state

power were intended by the Framers." *Alden*, 119 S. Ct. at 2259 (quotation omitted). None of the actions expressly prohibited by Article I addresses proprietal action. In light of the historical basis of the foreign affairs and foreign commerce powers, the Court should apply the market participant doctrine to the claims under both powers in this case. *See* 10 Op. Off. of Legal Counsel at 84-86 ("We do not think the [*Zschernig*] principle should be extended to state proprietal action"); *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 742 F. Supp. 900, 903 (M.D. Pa.), *aff'd*, 916 F.2d 903, 909-13 (3d Cir. 1990) (applying market participation doctrine to foreign commerce [district and circuit courts] and foreign affairs [district court] claims against "Buy American" laws), *cert. denied*, 501 U.S. 1212 (1991).

B. Selective Purchasing Is Market Participation: It Represents the Right to Boycott Enjoyed by Private Persons for Two Centuries.

Selective purchasing laws such as the Burma Law represent market participation, not regulation. These laws represent the same right to boycott exercised by private persons long before and after the adoption of the federal Constitution in 1787.

Selective purchasing laws have a long pedigree. In the New England and other colonies, the founding generation considered the nonimportation boycott to be a wise alternative to war. *See* Charles McLean Andrews, *The Boston Merchants and the Non-Importation Movement* 17, 33-34, 40-41, 43, 55 (1968); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 Pa. L. Rev.

287, 330-35 (1990). More recently, the Court has reaffirmed its view that private boycotts have historical roots in rights protected by the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. at 907. Recent laws on South Africa, Burma, and Northern Ireland maintain these long private and public traditions. *See* Pet. App. 10; Jt. App. 144-56; *Board of Trustees*, 562 A.2d at 749-53 (divestment ordinance is market participation). Meanwhile, private companies have repeatedly conducted their own "selective purchasing." Voluntary "codes of corporate conduct" and corporate withdrawals from Burma -- many of which criticize the conduct of foreign governments or firms -- show that Massachusetts has acted as private actors can and do act. *See* Debora L. Spar, *The Spotlight and the Bottom Line -- How Multinationals Export Human Rights*, 77 Foreign Affairs (March/April 1998) at 7; United States Dep't of Labor, *The Apparel Industry Codes of Conduct: A Solution to the International Child Labor Problem?* (1996) at 8, 13 n.16 ("Clinton Administration [has] encouraged United States corporations and organizations to develop their own voluntary codes of conduct for their foreign operations"); 155, 157 (NFTC members have established codes of conduct and withdrawn from Burma, citing human rights concerns) (cited excerpts at R. 389, 391 n.16, 402-03, 411-12, 413-14); Jt. App. 225 ¶ 48 (NFTC stipulates that its members have "directly encouraged legal reforms in foreign countries" and have "asked foreign governments to change their laws and practices concerning child labor").

The important differences between the federal and state Burma laws further show that the state law is proprietary and the federal law regulatory. The Federal Burma Law bans new

investment by private persons. It does not govern federal procurement. Private companies are not free to avoid the federal ban on new investment: the federal law represents the exercise of the sovereign power uniquely enjoyed by government to compel private action under the threat of punishment.

In contrast, the Massachusetts law governs only the procurement of goods and services by the State -- and thus a market created solely by State purchasing. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219, 2230 (1999) (market participant exception applies where State is "buying and selling in the market"). It does not prohibit or compel private action: every domestic and foreign company is free to continue to do business with Burma. The limits on public purchases imposed by the law are therefore proprietary activity exempt from the constitutional claims in this case. *See* Laurence H. Tribe, *Constitutional Law* (1988 ed.) § 6-22, p. 469 (a state "opposed" to foreign regime may not -- absent congressional authorization -- bar businesses from its jurisdiction or ban trade by its citizens, but may adopt selective purchasing laws).

Despite the obvious differences between the state and federal laws, the court below deemed the state law an attempt to regulate because it "pursue[s] goals that are not designed to favor its citizens or to secure local benefits." Pet. App. 46. This ruling ignores an important purpose of the state law. While *one* purpose of the Burma Law is indirectly to encourage change in Burma, that is not its only purpose. The law is also intended to disassociate the Massachusetts government and its tax dollars from the denial of human rights in Burma. *See* Jt. App. 51 (remarks of Sen. Walsh) (prior to enactment of selective

purchasing law on South Africa, Massachusetts had become a "party and unwitting conspirator" to human rights violations); 52 (prior to enactment of Northern Ireland law, Massachusetts had "subsidiz[ed] bad practices through [its] contracts"); *see also* Jt. App. 197 (Secretary of State opines that "state and local officials" have "right" and "responsibility" to apply "moral considerations" to their "procurement policies"). There is no question on this record that the Massachusetts Legislature would have enacted the Burma Law even if it believed that it could not effect change in Burma. Even if the Court believes that State or local governments may not constitutionally *encourage change* in foreign countries, selective purchasing laws must be upheld against a facial attack because they are a valid exercise of the right to disassociate from a repugnant regime. In light of this valid local purpose, the Court should deem the Burma Law market participation immune from this facial attack. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) ("Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"; "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"); *see also South-Central Timber v. Wunnicke*, 467 U.S. 82, 101-103 (1984) (Rehnquist, J., dissenting) (conditions on state sale of timber are market participation where state could accomplish same end by indisputably valid means).

The state need not show an economic benefit to itself or its citizens in order to establish that a selective purchasing law is proprietary activity. A private boycott on purely altruistic grounds is no less private, and possibly more worthy of protection under the First Amendment, than a profit-motivated boycott.

Similarly, the Court has held state action to be proprietary even where the stated or obvious purpose of the state law -- or its effect -- was to influence private conduct and thus achieve goals unrelated to local economic self-interest. *See Hughes*, 426 U.S. at 814 (environmental concerns). Thus, in *Hughes and Reeves*, "[the States] did not enter a presumably unmanipulable market with the profit-maximizing goals implied in the phrase 'market participation.' Instead, the States intended their entrances to affect the flow of commerce so as to enhance *public* values -- improvement of the environment or increased supply of a needed product at the expense of the state as a business." Laurence H. Tribe, *Constitutional Choices* (1985) at 144-46 (emphasis in original). Market participation may promote public values broader than local economic benefits because the doctrine rests on principles of federalism as well as an analogy to private conduct. *See Reeves*, 447 U.S. at 438.

Nothing in *Wunnicke* suggests that the Burma Law is a regulatory measure. In *Wunnicke*, a plurality of the Court held that the market participant doctrine did not protect a discriminatory restriction imposed by Alaska, which required purchasers of state-owned timber to process the logs within the State. The plurality reasoned that this additional *restriction* on private activity reached beyond the immediate market in which the State was participating -- the sale of its timber -- and that for purposes of applying the market participant doctrine, the "market" must be "relatively narrowly defined." 467 U.S. at 97-98. However, the plurality also emphasized that the State was attempting to impose an additional *downstream restriction*, going beyond what sellers, who in the ordinary course of commercial endeavor have no continuing interest in the product once it is

sold, traditionally do. *Id.* at 98-99.

In contrast, the Massachusetts state government is the ultimate purchaser of all goods and services covered by the Burma Law, and purchasers traditionally do "decide with whom they will deal," even if that decision indirectly affects secondary *upstream* markets. Indeed, given that *White* accepted an upstream restriction on whom private contractors can hire (460 U.S. at 208), a selective purchasing law could not possibly be invalid simply because it might affect secondary upstream markets. Like the Baltimore divestment ordinance and the "Buy American" laws, the Burma Law places no "restriction on private economic activity [which] takes place after the completion of the parties' direct commercial obligation." *Board of Trustees*, 562 A.2d at 752 (quoting *South Central Timber*, 467 U.S. at 99). Like the restriction in *White*, the Burma Law imposes a narrow condition precedent on companies who are competing for state contracts and thus "cover[s] a discrete, identifiable class of economic activity in which the State is a major participant." 460 U.S. at 211 n.7. Its terms do not "reach beyond the immediate parties" to state procurement, and its indirect effects, if any, do not "figure[]" in "equation" used to judge whether the law is regulation or market participation. *Id.* at 210.

Nor do the cases decided under the National Labor Relations Act (NLRA), 29 U.S.C. § 51 *et seq.*, cited by the court below, restrict the scope of the market participation exception here. Each of the cases concerned the scope of the preemption of the NLRA, not the scope of the Constitution. "The market participant doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power *in areas where Congress has acted.*" *Wisconsin*

Dep't of Industry v. Gould, 475 U.S. 282, 289 (1982)(emphasis added). Emphasizing that "what the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what the States may do with the Act in place," the Court held that in enacting the NLRA, Congress intended to prohibit the States from interfering in any way with the "interrelated federal scheme of law, remedy, and administration." *Id.* (citations omitted). Eleven years later, the Court distinguished *Gould*, noting that a "State does not regulate . . . simply by acting within [a federally] protected area[]." *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993).

The court below relied on a single sentence in *Gould*, which stated that "for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 289; *see* Pet. App. 47. But this sentence merely shows that the Court viewed the Wisconsin statute as a "regulation" because it specifically linked the State's decisions to violations of the broad regulatory scheme erected by the NLRA, and punished companies for past violations of the federal regulatory law. The Court viewed the law as "an attempt to compel conformity with the NLRA." *Building & Constr. Trades Council*, 507 U.S. at 228. The Massachusetts law, in contrast, does not depend for its operation on reference to a federal regulatory scheme. Unlike the Wisconsin scheme, the Burma Law does not disqualify companies from eligibility for state contracts on the basis of past actions, but rather makes their continuing, unrestricted eligibility for contracts subject to certain conditions with which they can prospectively comply. Thus, the Burma Law does not operate like the statute in *Gould*, but rather like the condition on the

procurement of construction services in *White*. *See Gould*, 475 U.S. at 289 (reaffirming *White*); 10 Op. Off. of Legal Counsel at 77-79 (distinguishing *Gould*);

For these reasons, the Court should hold that the Burma Law is not subject to review under the foreign commerce or foreign affairs powers.

III. SELECTIVE PURCHASING LAWS DO NOT INTERFERE WITH THE CAPACITY OF THE UNITED STATES TO CONDUCT FOREIGN RELATIONS.

A. The Court Need Not Reach the Foreign Affairs Power Claim If It Holds That the Burma Law Is Market Participation or Implicitly Permitted by Congress.

The court of appeals held that the Massachusetts law "interferes with the foreign affairs power of the federal government." Pet. App. 5, 14-41. Citing *Zschernig v. Miller*, the court said that the "Massachusetts law presents a threat of embarrassment to the country's conduct of foreign relations regarding Burma" and therefore "has more than an "incidental effect" on foreign affairs. Pet. App. 27.

The Court need not reach this question: it may decide that selective purchasing is market participation and therefore not subject to a claim under the dormant foreign affairs power. Alternatively, the Court may decide that Congress has implicitly permitted state and local selective purchasing laws and *Barclays'* standard of implicit Congressional permission for action

challenged under the Foreign Commerce Clause applies equally to a claim under the dormant foreign affairs power. Under *Barclays*, express Congressional *approval* of a state law affecting foreign affairs is not required for the Court to hold a state law constitutional: while the federal government must have the "*capacity*" to "speak with one voice" on foreign affairs when the national interest so requires, "Congress may more passively indicate that certain state practices do *not* 'impair federal uniformity in an area where federal uniformity is essential;' . . . it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminated against interstate commerce . . . ." *Id.* at 323 (emphasis in original). This more deferential rule for state laws affecting *foreign* policy reflects the fact that the "nuances" of the "foreign policy of the United States are much more the province of the Executive Branch and Congress than of th[e] Court . . . ," *Barclays*, 512 U.S. at 327, and the "judiciary is not "vested with power to decide how to balance" the effects of a state law on foreign relations. *Id.* at 328. Under this principle of judicial restraint in the area of foreign affairs, the Court "leave[s] it to Congress -- whose voice, in this area, is the Nation's -- to evaluate whether the national interest is best served by uniformity, or state autonomy." *Id.* at 331.

This deferential standard should apply to claims under *Zschernig* as well. Claims under *Zschernig* -- like the claims under *Barclays* -- essentially allege that state or local action unconstitutionally interferes with the conduct of foreign policy. Regarding both dormant powers, Congress may authorize implicitly what the negative force of the grant of federal power might otherwise forbid. Accordingly, if the Court holds that

Congress has implicitly permitted the Burma Law, it should reject both the dormant foreign commerce and foreign affairs power claims. If, on the other hand, the Court reaches these claims, it should hold that selective purchasing laws such as the Massachusetts Burma Law do not interfere with capacity of the United States to conduct foreign relations.

B. The Structure and Terms of the Constitution Require the Court to Read *Zschernig* Narrowly to Permit the Indirect Effects of Selective Purchasing Laws.

Zschernig remains "a unique statement and a sole application of constitutional doctrine." Pet. App. 30 (quoting Louis Henkin, *Foreign Affairs and the Constitution* (1996 ed.) at 165); *see id.* at 162 ("until 1968, there was no hint of such a principle"), 165 n.; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1641-64 (1997).

Zschernig did not concern selective purchasing or divestment. In *Zschernig*, the Oregon statute at issue regulated the terms under which a nonresident alien could inherit property from an Oregon decedent. The state law prohibited inheritance by a nonresident alien unless three conditions were satisfied: (1) the alien's government must accord Americans the right to inherit on equal terms with its citizens; (2) the alien's government must give Americans the right to receive payment in the United States of funds from foreign estates; and (3) the nonresident alien must be able to receive "the benefit, use or control" of the proceeds of the Oregon estate "without confiscation" by his government. The

Court concluded that this type of probate law *as enforced in the Oregon courts* had "a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. The Court stressed that the extensive record of enforcement of the statute by the Oregon courts showed a "*great potential for disruption or embarrassment*" in the conduct of foreign relations: the Oregon courts had repeatedly criticized the administration of foreign laws by foreign officials, questioned their credibility, and denied foreign citizens private inheritances based on "foreign policy attitudes" toward particular governments. *See* 429 U.S. at 435 (emphasis added).

Zschernig did not overrule *Clark v. Allen*, 331 U.S. 503 (1947), which upheld the facial validity of a California statute similar to the first two sections of the Oregon law. Although the California statute in *Clark* was clearly designed to influence foreign countries to change their laws to allow Americans to inherit, the Court dismissed the constitutional claim against the law as "farfetched." *Id.* at 517. Emphasizing that "rights of succession" were peculiarly a matter of local law, the Court agreed that "[w]hat California has done will have some incidental *or indirect* effect in foreign countries" but concluded "that is true of many state laws which none would claim cross the forbidden line." *Id.* (emphasis added). Neither *Zschernig* nor *Clark* addressed the exercise of public spending powers -- only the regulation of private inheritances by foreign citizens.[3]

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[3] The lower court cases cited by the court of appeals similarly concern the regulation of private activity, not public spending. *See* Pet. App. 27-29.

The court below stated that the "precise boundaries" of *Zschernig* "are not clear[,]" and "subsequent Supreme Court holdings have done little to clarify the reach of the Court's holding . . . ." Pet. App. 20, 30. The court below conceded that "some degree of state involvement in foreign affairs is inevitable" and that "[i]n the governance of their affairs, states have variously and inevitably impinged on United States foreign relations." Pet. App. 18 (*quoting* Henkin, *supra*, at 162). This trend is now a truism: increased foreign trade and global communication and transportation have married the States to foreign firms and countries, for better or worse, leaving "the line between national and state and local concerns . . . much less clear than when the Republic was founded." Bilder, 83 Am. J. Int'l Law at 828.[4]

The court below asked whether the Massachusetts law fell within "the boundaries of permissible state activity in the foreign affairs context." Pet. App. 18. In striking down the law, however, the court below moved the boundaries of *Zschernig* so as to threaten state and local divestment laws, resolutions, and

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[4] The Commonwealth of Massachusetts maintains twenty-three "sister-state" and other bilateral agreements with sub-national foreign governments and trade promotion organizations. Pet. App. 18; Jt. App. 204, ¶ 4. Many other States have similar programs. Henkin, supra, at 426-27 n.26; Brenda S. Beerman, State Involvement in the Promotion of Export Trade, 21 N.C. J. Int'l. L. & Com. Reg. 187, 202 -220 (1995). The Commonwealth routinely helps companies "increase their business in international markets" by maintaining overseas trade offices and introducing companies to officials of foreign governments. Jt. App. 203, ¶ 1. These companies include two members of the Board of Directors of the NFTC. *Id.* at 204, ¶ 3; R. 99.

many other laws related to foreign affairs.

The structure and terms of the Constitution show why *Zschernig* must be cabined to its facts. The Constitution does not use the terms "foreign relations," "foreign policy," or "foreign affairs." Instead, it grants certain powers to the federal government and denies certain powers to the States, reserving to the States in the Tenth Amendment the powers not granted or denied. Article II, § 2, makes the President Commander in Chief of the armed forces of the United States and authorizes him to enter into treaties and to appoint and receive ambassadors. Congress is given authority to regulate foreign commerce, raise and support armies, define offenses against the law of nations, and to declare war. Art. I, § 8. The powers granted to the federal government under Articles I and II, when exercised, are made plenary through the Supremacy Clause, Art. VI, § 2.

Other parts of the Constitution affirmatively show that the Framers expected that state action would sometimes affect foreign affairs. U.S. Const. Art. I, § 10 (authorizing agreements between States and foreign countries and certain military actions with consent of Congress); Art. III, § 2 (jurisdiction to hear cases between States and foreign parties). Instead of a blanket prohibition on such contact, the Framers denied to the States specific powers, *e.g.*, to engage in war, enter treaties, and levy duties on imports or exports. Art. I, § 10, cls. 1-3. The Framers likely prohibited these actions because they had been restricted by the Articles of Confederation, long associated with international sovereignty, and posed unacceptable risks to the effective conduct of foreign affairs. *See* Goldsmith, 83 Va. L. Rev. at 1643-44 & n.121. None of the state actions prohibited by Art. I concerns a proprietary power such as the purchase of goods and services or

the management of state investments. Rather, these proprietary powers are "reserved to the States, or the people" by the Tenth Amendment.

"The most natural inference from these provisions and from the Constitution's enumerated powers structure is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty." *Id.* at 1642. While the Court in *Zschernig* apparently did not draw the same inference, the structure and terms of the Constitution show that *Zschernig* must be read with "caution," to invalidate only state actions that reflect acts of international sovereignty and create the same degree of risk to national security as the actions prohibited by Article I. *See Alden*, 119 S.Ct. at 2259.

In this case, nothing in the Burma Law enters a treaty, engages in war, levies duties on imports or exports, or conducts direct relations with Burma. Like the statute in *Clark* and unlike the statute in *Zschernig*, the implementation of the Burma Law does not require repeated decisions by state officials about the operation of Burmese law or the credibility of Burmese officials. Jt. App. 217 (Stipulation ¶ 21). The general statements critical of Burma made by Massachusetts supporters of the Burma Law do not render the law unconstitutional because *Zschernig* does not foreclose all "actions involving substantive judgments about foreign nations"; rather, "a single general decision" about a nation is "beyond the scope of *Zschernig*." *Board of Trustees*, 562 A.2d at 745-46. In short, the procurement of goods by state or local government -- by its nature -- is not an act of international sovereignty that poses an unacceptable risk to the security of the United States. *Cf. United Building & Constr. Trades v. Mayor*

and Council of City of *Camden*, 465 U.S. 208, 221 (1984)(city's expenditure of "its own funds" may be "crucial factor" in defeating claim under Privileges and Immunities Clause).

The Massachusetts law further satisfies *Zschernig* because its effects are indirect, not direct; remote, not immediate; and contingent, not inevitable. While some companies have withdrawn from Burma, citing the Massachusetts law, other companies have left because of the denial of human rights there. R. 362, 367. As for the NFTC's own view of the effects of the law, it has elsewhere argued that "unilateral" governmental action has had "no success" in any country and "only make[s] a statement without any impact." Jt. App. 86. To be sure, selective purchasing laws are enacted in part in the hope that they -- when combined with similar efforts worldwide -- might prompt a foreign government to respect human rights. Whatever the aspirations of such laws, however, their center of gravity lies at home, not abroad, and their effects -- if any -- are indirect and distinguishable from the direct effects of the regulation of alien inheritances, let alone the effects of a treaty, tariff, or blockade. For these reasons, the Court should read *Zschernig* narrowly and hold that the Massachusetts Burma Law is constitutional.

C. The Complaints of Foreign Countries under a Trade Agreement Do Not Establish Unconstitutional Interference with the Conduct of Foreign Relations.

Nor do the complaints by foreign countries under trade agreements establish that the Burma Law creates "a great potential for disruption and embarrassment" to the conduct of the

foreign relations of the United States. Pet. App. 20, 25, 27. *Barclays* rejected reliance on the "disapproval" of "many of our trading partners," (512 U.S. at 324 n.22), for good reason: on the stage of international politics, the drama never ceases, and each season is full of conflicts, conspiracies, protests, and threats. None of these perennials, however, should influence a *United States* court to nullify the democratic action of the citizens of a State. *See Barclays*, 512 U.S. at 320 ("battalion of foreign governments that has marched to [plaintiff's] aid, [through] diplomatic notes, *amicus* briefs, and even retaliatory legislation . . . [lacks] such force as to dictate th[e] Court's Commerce Clause jurisprudence"); *see id.* at 327-328 (even state action "likely to provoke retaliatory action by foreign governments"is not unconstitutional); *id.* at 324 n. 22 and 337 (O'Connor, J., concurring in judgment).

Judicial reliance on mere trade complaints poses a substantial threat to state legislative action. The United States has entered a new generation of agreements governing international trade and procurement. *See* North American Free Trade Agreement (NAFTA) Implementation Act, P.L. 103-182, 107 Stat. 2057 (1993), 19 U.S.C. §§ 3301 *et seq.*; Uruguay Round Agreement Act of 1994 (URAA), P.L. 103-465, 108 Stat. 4809, 19 U.S.C. § 3501 *et seq*. Under these agreements, Congress has purported to subject hundreds of state laws to review by international bodies. Agreement Establishing the World Trade Organization (WTO), Annex 1B, art. 1, 33 I.LM. 1144 (1994), 1169; 1994 U.S.C.A.A.N. at 4052; 19 U.S.C. § 3312 (NAFTA). Foreign countries have targeted dozens of state laws -- including subsidies, health and safety standards, environmental standards, and taxation -- for attack. *See* European Commission, *Report on*

Barriers to Trade and Investment in the United States (1999). These attacks will multiply if United States courts continue to rely on mere trade *complaints* as the basis for constitutional judgments against state laws.

In this case, the European Union and Japan have challenged the Massachusetts Burma Law under the GATT at the World Trade Organization (WTO). Pet. App. 10, 20, 24. The United States Trade Representative (USTR), however, has pledged a strong defense of the Massachusetts Burma Law at the WTO. R. 425; Jt. App. 206, 82 (unanimous Massachusetts congressional delegation objects to Japanese complaint and urges USTR to defend law as "internal affair[] of Massachusetts"). In these circumstances, the risk of retaliation by other countries under GATT is speculative. If the Executive Branch wishes to avoid retaliation and end foreign complaints -- and the minimal "embarrassment" alleged in this case -- it may bring a judicial action against the State under the URRA. Since it has determined not to do so, the judgment of the court below actually undercuts the power of the Executive by relying on trade complaints that the Executive has determined to resist.

Congressional action further shows that the foreign complaints should be ignored in this case. Congress expected that state laws could be challenged at the WTO under GATT, but it denied a private right of action to enforce GATT in the courts of the United States. *See* 19 U.S.C. §§ 3512(b)(2)(A),3512(c)(1); 1994 U.S.C.A.A.N. at 4055; Arg. I.C, above. The same Congress would be surprised to learn that complaints under GATT now fuel constitutional claims. Furthermore, Congress in 1996 presumably discounted the risk of foreign retaliation when it enacted unilateral sanctions against Burma and left state and local laws

undisturbed. Thus the record of private and governmental actions in this case shows that there is no "great potential for disruption and embarrassment" found by the Court in *Zschernig* in 1968.

Despite these factors, the court below expressly based its constitutional holdings on the complaints made by the European Union and Japan. Pet. App. 24-27. The court's reliance on trade complaints -- inevitable rows in an era of global procurement -- grants to foreign countries and firms a "heckler's veto" against state laws. Absent reversal by this Court, foreign complaints under NAFTA and GATT will increasingly fuel constitutional claims against divestment and selective purchasing laws, "Buy American" laws, environmental regulations, and other state laws. *See* Brief for Non-Profit Organizations, *Amici Curiae*; Brief for Comptroller of the City of New York, *et al.*, *Amici Curiae*. These claims will sap the lawmaking powers of the States and unduly enlarge the role of the courts, casting the judiciary -- inappropriately -- as the "overseer of our government." *Barclays*, 512 U.S. at 330. The Court should reject this role and instead defer to the powers of Congress "to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests." *Perez v. Brownell*, 356 U.S. 44, 57 (1958), *overruled on other grounds, Afroym v. Rusk*, 387 U.S. 253 (1967).

IV. THE BURMA LAW DOES NOT VIOLATE THE FOREIGN COMMERCE CLAUSE.

The court of appeals also ruled that the Burma Law violates the Foreign Commerce Clause, in that it "facially discriminates

against foreign commerce," "interferes with the ability of the federal government to speak with one voice," and "attempts to regulate conduct beyond its borders." Pet. App. 50-57. The court also found that "Massachusetts has failed to put forth a legitimate local justification in support of its law." Pet. App. 57-59.

If the Court holds that the Burma Law represents market participation or that Congress has implicitly permitted the law, the Court must reject the claim under the Foreign Commerce Clause. Even if the Burma Law is subject to review under that clause, however, the Court should reject the claim on its merits.

First, the Burma Law applies equally to firms domiciled in Massachusetts, other States, and foreign countries. Whether a firm is based in Burma or Boston, it is subject to the price preference imposed by the law. The law is therefore distinguishable from laws that discriminate against firms domiciled outside the United States. *See, e.g., Kraft General Foods, Inc. v. Iowa Dep't of Revenue*, 505 U.S. 71, 73-77 (1992).

The law is also distinguishable from state laws that "intend to secure economic advantages for local businesses at the expense of businesses situated elsewhere." *Board of Trustees*, 562 A.2d at 754 (divestment ordinance concerning South Africa does not discriminate). Even a state law that singles out a foreign country does not violate the Foreign Commerce Clause unless it discriminates "in favor of in-state interests." *Id.* at 754 n. 56 (citations omitted). The Massachusetts law clearly does not.

Even if protectionist intent need not be shown, however, a criterion based on commerce with a particular country is not unconstitutional because the "[Foreign Commerce] Clause protects the inter[national] market, not particular inter[national] firms" and does not prohibit a state law that "causes some

business to shift from one inter[national] supplier to another." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (interpreting domestic Commerce Clause). Even if the Burma Law causes some state business t ift from one international supplier to another, this effect would not show unconstitutional discrimination. Thus, for example, if Massachusetts were concerned that state purchases from a particular country might increase the smuggling of heroin onto Massachusetts streets, it could decline to purchase goods from that country. Since the Burma Law does not discriminate against foreign commerce as a class or favor in-state or United States interests, it does not discriminate in violation of the Foreign Commerce Clause.

Nor does the law have an unconstitutional "extraterritorial effect." *See* Pet. App. 55-56. As shown above in Arg. III.B, the effects of the Burma Law are indirect, not inevitable. It does not "impose economic sanctions for violations of its laws" or "regulate conduct wholly beyond its borders." *Id.* The deferential approach of *Barclays* counsels that the Court should not extend the "extraterritorial effect" principle of the domestic Commerce Clause to state laws touching foreign affairs.

In any event, the Court should uphold the law because it has a legitimate local purpose: to disassociate Massachusetts from the human rights violations in Burma. The court below doubted whether an "expression of moral outrage" is a sufficient local interest to satisfy the Foreign Commerce Clause. Pet. App. 58. However, the long history of boycotts in aid of human rights shows that the moral statement made by the Burma Law is a product of tradition and reason and promotes values embodied in the First Amendment. *See First National Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978) (First Amendment promotes a

democratic society by protecting free debate of public issues); Vt. J.H.R. 157 (resolution on conditions in Burma); Vt. Acts of 1999, c. 13 (directions to public pension funds regarding shareholder resolutions on Burma); Ordinance of Oakland, CA (April 23, 1996) (Jt.App. 156) (divestment ordinance concerning Burma). Accordingly, the Court should reject the NFTC's view that state and local resolutions concerning foreign policy are unconstitutional *(see* Jt. App. 232-33) and hold that the moral statement embodied in the Massachusetts Burma Law satisfies the requirement of a legitimate local purpose under the Foreign Commerce Clause.

This moral statement in support of freedom -- freedom from dictators and forced commerce with their vendors -- does not interfere with the ability of the federal government to "speak with one voice" in foreign affairs. *See Barclays*, 512 U.S. at 320 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979)). The court of appeals read this metaphor literally, to warrant the courts to stifle all dissent to national policy, and not merely local actions that are contrary to national policy. *Barclays* and *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), however, show that the "one voice" test never literally forbade multiple *voices* but rather certain types of state *actions* concerning foreign affairs. The statements embodied in selective purchasing and divestment laws "encourage[] ordinary citizens, through the government closest to them, to participate more meaningfully in the formation and carrying out of foreign policies that deeply affect their lives." Bilder, 83 Am. J. Int'l Law at 831. Multiple voices are not *per se* unconstitutional because they do not affect the *capacity* of the Congress to establish uniformity when the national interest so requires.

Where "Congress is aware of state activity to restrict procurement . . . and yet has not yet imposed a policy of national uniformity . . . state procurement policy fits comfortably within the . . . Court's observation that nothing in the Foreign Commerce Clause insists the Federal Government speak with any particular voice." *Trojan Technologies*, 916 F.2d at 912. Under *Barclays*, the Court has left it to Congress -- "whose voice, in this area, is the Nation's -- to evaluate whether the national interest is best served by . . . uniformity, or state autonomy." *Id.* at 331. The court of appeals erred in making its own evaluation of the national interest here.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the United States Court of Appeals for the First Circuit.

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